Riviera Supper Club *and* Local 6-578, Oil, Chemical and Atomic Workers International Union, AFL–CIO. Case 18–CA–11524

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 26, 1992, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

As more fully detailed in the judge's decision, the Respondent's restaurant burned down in January 1990,[1] and because of the consequent cessation of operations, all of its union-represented employees were discharged. The restaurant remained closed for about 8 months; during that time, the parties' collective-bargaining agreement expired. On October 1, the Respondent reopened the restaurant, its operations virtually unchanged, with a full staff of 18 employees, 10 of whom the Respondent had employed prior to the fire. The Union, on learning that the Respondent was rebuilding the facility and intended to reopen, requested bargaining on July 27, and subsequently renewed the request. The Respondent did not reply to the Union's requests. The judge, rejecting the Respondent's contention that it had lawfully withdrawn recognition based on its asserted good-faith doubt of the Union's continuing majority status, concluded that, by failing to respond to the Union's bargaining demand, the Respondent violated Section 8(a)(5) and (1) on and after July 27. We agree with the judge, as explained below.

In *Sterling Processing Corp.*, 291 NLRB 208 (1988), a case with some factual similarities to the instant case, the employer's union-represented employees were discharged with no reasonable expectation of recall when the employer closed its plant for economic reasons. After a 19-month hiatus during which the parties' collective-bargaining agreement expired, the plant reopened with its operations substantially unchanged and with a majority of the employee complement having been on the employer's payroll prior to the closure. In the circumstances of that case, the Board concluded, inter alia, that the employer did not violate the Act by making unilateral determinations of terms and conditions of employment prior to reestablishing its operation, finding generally that the employer had no obligation to bargain prior to the hiring of a representative complement of employees. The Board found, however, that the employer's bargaining obligation renewed when it reopened employing a representative complement of employees, the majority of whom were employees prior to the closure. Id. at 209–210.

Although not cited by the parties or the judge, we recognize that *Sterling* has potential impact here with respect to the date on which the Respondent's statutory duty to bargain was effective. However, in light of the complaint allegations in this case, i.e., alleging generally a refusal to recognize and bargain with the Union rather than the more specific allegation of unilateral changes in working conditions (as was the case in *Sterling*), we find that the Respondent's unlawful refusal to bargain was proven no later than October 1, when the Respondent reopened its restaurant with a full employee staff, the majority of which was comprised of unit employees who had worked for the Respondent prior to the fire.[2] The Union's bargaining request was a continuing one, and remained effective as of October 1. See, e.g., *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 52–53 (1987), affg. 775 F.2d 425 (1st Cir. 1985); *Sterling*, supra at 217.[3] Accordingly, we affirm the judge's finding that the Respondent unlawfully failed to respond to the Union's bargaining request in light of the above, consistent with the complaint allegations, with the judge's recommended remedy, and with *Sterling*.

In adopting the judge's decision, we also affirm his rejection of the several components making up the Respondent's asserted good-faith doubt of the Union's continuing majority status, as set forth in section III,D,2 of the decision.[4] However, with respect to his

[1] All dates hereafter are in 1990.

[2] We therefore find it unnecessary to consider whether the violation may have been made out earlier, such as July 27, or the unfixed date the Respondent hired its new work force, or on a theory which distinguishes the application of *Sterling*.

[3] Member Oviatt agrees that the Respondent did not have a good-faith doubt of the Union's majority status when it reopened its restaurant on October 1, but he relies on the facts of this case, in particular that: (1) the restaurant remained closed only for 9 months; (2) during this time the Respondent's owner told former employees that he expected to operate nonunion; and (3) when the Respondent reopened a majority of its unit complement were former employees. Member Oviatt finds *Sterling* to be factually inapposite.

[4] In affirming, we do not rely on the judge's references to employee polling under *Struksnes Construction*, 165 NLRB 1062 (1967), and his apparent analogizing of such polling to the facts of this case, in which no polling occurred. We also do not rely on his statement that an employer should be required to notify the union of its doubt of the union's majority support prior to withdrawal of recognition, and his finding that the Respondent failed to satisfy this

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disposition of the various employee statements allegedly repudiating the Union as collective-bargaining representative, we agree that such statements were ineffective, but solely because they were tainted by the remarks of the Respondent, through its agents Duane and Dallas Hansen, that the Respondent intended to operate nonunion when the restaurant reopened. The Hansens made those remarks immediately before the employees made the statements seized on by the Respondent as a basis for good-faith doubt. The Board has found such employer statements coercive and unlawful, and sufficient to taint, without further consideration, a showing of employees' rejection of the Union. See, e.g., *Williams Enterprises*, 301 NLRB 167 (1991), *Kessel Food Markets*, 287 NLRB 426, 428–429 (1987), enf. 868 F.2d 881 (6th Cir. 1989). In light of our agreement with the judge that the employee statements were thus tainted, we do not rely on the rest of his analysis concerning them.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Riviera Supper Club, Austin, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

requirement here. Finally, we note that *Hutchinson-Hayes International*, 264 NLRB 1300 (1982), a case cited in passing by the judge, was recently overruled regarding its statement of an employer's burden of proof to establish a lawful withdrawal of recognition. See *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). None of the qualifications above has a significant impact on our decision in this case.

[5] Like the judge, we find it unnecessary to evaluate the substance of the employee statements to determine whether each constituted a repudiation of the Union as collective-bargaining representative and we note that the judge did not make underlying fact findings in this regard.

In light of the above finding that the employee statements were tainted, we also find it unnecessary to consider the General Counsel's contention in its answering brief that the Respondent has failed to except to the judge's analysis of this issue, and that the Respondent's affirmative defense in this regard can be rejected because of the limited scope of the Respondent's exceptions.

Marlin O. Osthus, Esq., for the General Counsel.
Kermit Hoversten and *Daniel M. Rankin, Esqs. (Hoversten, Strom, Johnson & Rysavy)*, of Austin, Minnesota, for the Respondent.
Larry D. Kelley, of Austin, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Austin, Minnesota, on July 30, 1991, and is based on a charge filed by Local 6-578, Oil, Chemical and Atomic Workers International Union, AFL–CIO (the Union) on November 1, 1990, alleging generally that Riviera Supper Club (Respondent) committed certain violations of Section 8(a)(1)[1] and (5)[2] of the National Labor Relations Act (the Act). On May 21, 1991, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and Counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that Respondent is a proprietorship with an office and place of business in Austin, Minnesota, where at all times material herein it has been engaged in the business of operating a public restaurant selling food and beverages; that upon a projection of its operations since on or about October 1, 1990, at which time Respondent reopened its facility and resumed its operations, Respondent, in the course and conduct of its business operations will annually derive gross revenues in excess of $500,000; and that, based on a projection of its operations since on or about October 1, 1990, Respondent, in the course and conduct of its business operations will annually purchase and receive at its facility described above goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Minnesota.

Respondent, in its answer, while generally admitting the allegations of the complaint having to do with the nature and

[1] Sec. 8(a)(1) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7: . . . . ''

Sec. 7 of the Act provides that, ''Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).''

[2] Sec. 8(a)(5) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .''

Sec. 8(d) of the Act provides that, ''For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . . ''

location of its business, alleged that the business was not in operation during the period from January 20 through September 30, 1990, due to a fire, denied that it would derive annual gross revenues in excess of $500,000, and affirmatively alleged that at no time since Respondent commenced operations in 1974 has Respondent derived annual gross revenues in excess of $500,000; accordingly, Respondent denied that Respondent is engaged in commerce, or in a business affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

Accordingly, this matter remains in issue, and shall be discussed, infra.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background and Labor Relations History*

The restaurant known as the Riviera Supper Club has operated in Austin, Minnesota, for a number of years. In 1974 it was purchased by Duane Hansen, and it is still owned by him.

Though denied at trial by Respondent, it is clear that even prior to its purchase by Hansen, its employees had been represented in collective bargaining by the Union. Respondent, according to the credited and uncontroverted testimony of the Union's business manager, Larry Kelley, through its membership in a multiemployer bargaining association, was party to a series of collective-bargaining agreements with the Union, for over 20 years. The last such agreement was effective from July 1, 1987 through July 1, 1990.

At trial, Respondent effectively amended its answer to admit that, if the Union is entitled to representation rights, the appropriate unit is to be described as follows:

> All full-time and regular part-time employees employed at [Respondent's] Austin, Minnesota restaurant, including cooks, waitresses/waiters, kitchen helpers, dishwashers, busboys/busgirls, hostesses and janitors; excluding office clerical employees, guards and supervisors as defined in the Act.

B. *Facts Relating to the Jurisdictional Question*

It was stipulated at trial that in 1989 Respondent purchased goods and products valued at $114,582.96 from suppliers located outside the State of Minnesota, and that in 1990, up to November 25, it purchased goods and services valued at $46,357.29 from suppliers located outside the State.

While Counsel for the General Counsel appears to concede that Respondent never experienced sales in excess of $500,000 in any year prior to the fire, it gross sales since a fire (explained later herein), on a projected basis, are sufficient to allow the Board to assert jurisdiction. In this respect, the parties stipulated that after the restaurant reopened in October 1990 the restaurant engaged in the following gross sales during the time period preceding the trial herein:

October 1990	$55,319
November 1990	56,021
December 1990	67,179
January 1991	50,184
February 1991	47,503
March 1991	44,047
April 1991	46,757
May 1991	49,992
June 1991	50,537
July 1991	43,446
Ten-month total	$460,985

Respondent's position is that, since there is no guarantee that the level of gross receipts shown above exceeds that which it experienced prior to the fire, and since there is no guarantee that they will continue at this higher level, they must be considered as a sort of ''honeymoon,'' i.e., an exceptional and unrepresentative period, not sufficient to permit a projection for the remaining 2 months. Respondent also asserts that it would be unfair to base a finding jurisdiction upon figures relating to business done in a calendar year subsequent to the time that the alleged unfair labor practices were committed.

C. *The Facts Relating to the Alleged Unfair Labor Practices*

On January 20, 1990, Respondent's facility was destroyed by a fire. Accordingly, it ceased operations for a time. During the time that Respondent was out of operations, its collective-bargaining agreement with the Union expired, on July 1, 1990.

> On February 23, 1990 Respondent wrote to the Union, as follows:
>
> As you are already aware, my restaurant being operated under the name of The Riviera, burned down.
>
> Because of this unfortunate circumstances [sic] regretfully I have had to terminate all our employees. In the past we have participated with other restaurant owners in negotiating labor contracts with your Union. Due to the foregoing circumstances, please be advised that we will no longer participate in bargaining with the other restaurants in respect to any further contract negotiations. Because we are no longer operating a restaurant and have no employees, we are further notifying you that our working agreement with (the Union) [will] be terminated as of the last day of June 1990.
>
> We ask that this letter be notice to you and to each of the other restaurant owners that we will not be participating in any negotiations this year which we understand may be forthcoming in a few months.

The letter showed on its face that copies were sent to other restaurant owners who were parties to the collective-bargaining agreement with the Union.

Also on February 23, 1990, Respondent sent letters to its employees stating, inter alia, that,

> Since the restaurant burned down, we have been very uncertain as to any future plans relative to the restaurant. Because of this situation we have not had any work for any of you and cannot say when or if any work will be available in the future.
>
> Each of you have the need to plan for your own future. We therefore regretfully inform you that it is necessary for us to terminate your employment effective immediately.
>
> A copy of these letters to employees was sent to the Union.

On July 27, 1990, the Union sent Respondent a letter of congratulation concerning the rebuilding of its business facility, and its anticipated reopening. The letter went on to state:

> We recently met with other restaurant operators in Austin and renegotiated the labor agreement. Local 6-578 looks forward to renewing your participation and are [sic] extending an invitation to you to come down to our offices and review the current agreement. Or you may go to Kermit Hoversten's office.

On August 23, 1990, the Union again wrote to Respondent, calling attention to the fact that it had not heard any response to its letter of July 27, and advising that ''your refusal can only be interpreted to mean that you intend to operate non-union.'' The letter went on to refer to the good relationship between the Union and Respondent in the past, and that the Union would take whatever measures were necessary to inform the public of Respondent's actions.

Respondent asserts that ''because the Union failed or refused to contact [Respondent] before the old contract expired and negotiations for the new contract began, [Respondent] believed that the Union no longer represented the new Riviera employees,'' and ''that by terminating the old contract, the Riviera employees were no longer unionized pursuant to that contract.''

While the new facility was under construction prospective employees went there to inquire about jobs. According to Duane Hansen, during such meetings, a majority of prospective employees advised him that they did not want to be members of the Union when the restaurant reopened.

On August 6, 1990, Hansen's son, Dallas, held a meeting of all prospective waitresses at his apartment. Dallas was in charge of hiring and supervising waitresses, in his capacity as assistant manager of Respondent. Dallas advised his father after the meeting that the waitresses unanimously agreed that they didn't want to be part of the Union.

On October 1, 1990, the restaurant was reopened for business. It reopened with 18 employees, exclusive of the Hansen family. Of these 18, 10 had worked for the old restaurant; 8 were new to the enterprise.

After the charge herein was filed, a decertification petition was filed involving this unit. All except one of Respondent's employees signed the petition.

D. *Analysis and Conclusions*

1. The jurisdictional question must be answered contrary to Respondent's position.

In fact, the argument that figures used to support jurisdictional findings should predate the commission of the alleged unfair labor practices is completely without support. Respondent has cited no authority for such a proposition, nor could it. For it is clear from a reading of too many cases to require citation that jurisdictional findings are routinely based on figures relating to business done after the alleged unfair labor practices.

Further, while it is true that at trial Respondent was not permitted to speculate as to whether or not business would return to that of 1989, it is also true that Respondent was not qualified by his counsel to offer such an opinion about what business would be in the future. And, it is also true that Respondent's owner was permitted to testify about his ''feelings'' concerning whether or not the level of business he'd experienced since reopening should be regarded as unusual, and supply any factual basis he might have for expecting that it would not continue. He could only respond, even to the highly suggestive questions put to him, that it seemed to him that there were a lot of ''lookers'' since he'd reopened, and that he had no guarantee that they'd return.

However, the question of a guarantee is not relevant here. What is relevant is whether or not the facts of revenues actually experienced since reopening reasonably lead to the conclusion that during the remaining 2 months of the year after reopening Respondent will reach the gross revenue level of $500,000. *Hotel & Restaurant Employees Local 425 (Edelweiss, Inc.)*, 205 NLRB 236 (1973).

In this case it seems clear that the remaining two months of the year following reopening would have to be exceptionally poor, to permit Respondent to fall short of the $500,000 mark. After all, the lowest month experienced following the fire was $43,446. But, it needed to average only $19,508 during those two months in order to reach the $500,000 level. And, even if Respondent were to fall back to the level of business experienced in 1989 during those 2 remaining months, it would still average $32,453 per month.

Thus, in order to find that Respondent is unlikely to reach the $500,000 level, I would be required to accept as true that it would fall over 57 percent from the level of $46,098 which it actually experienced following the fire, and over 39 percent from the level which it experienced during the year before it reopened an entirely new facility.

Such a finding does not seem reasonable to me. Instead, I find and conclude that, by projecting gross revenues from the 10 months preceding the trial herein, the only figures available following the reopening of Respondent's business following a fire, Respondent gross revenues may be reasonably expected to exceed $500,000. *Northwest Smorgasbord*, 163 NLRB 425 (1967).

Accordingly, since Respondent's purchases of goods and services from suppliers located outside the state of Minnesota are conceded be Respondent to be sufficient to demonstrate jurisdiction, provided the retail standard of gross revenues is met, I find and conclude that Respondent is, and at all times material, has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Similarly, the question about the validity of Respondent's refusal to bargain with the Union following its reopening must be answered contrary to Respondent's position.

Several first principles applicable here should first be explained.

In *Station KKHI*, 284 NLRB 1339 (1987), the Board reaffirmed the applicable principles regarding the presumption

of a collective-bargaining representative's majority status and the circumstances in which an employer lawfully may withdraw recognition:

> Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the day recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.
>
> There is a similarly irrebuttable presumption of the union's majority status during the term of a collective-bargaining agreement; at its expiration, an employer may lawfully withdraw recognition on either of the two grounds described above. See, e.g., *KBMS, Inc*., 278 NLRB 826, 846 (1986), *BASF-Wyandotte Corp*., 276 NLRB 498, 504 (1985), *Burger Pits, Inc*., 273 NLRB 1001 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 19 v. NLRB*, 785 F.2d 797 (9th Cir. 1986). With respect to the second means of rebutting the presumption, the employer's expression of a reasonable doubt must be raised in a context free of unfair labor practices. See, e.g., *KBMS, Inc*., supra at 846, *Guerdon Industries*, 218 NLRB 658, 659 (1975).

Indeed, the Board's intent that withdrawal of recognition shall be permitted only upon a demonstration of objective criteria is underscored by its rule that an employer's polling of its employees concerning their union sympathies and support is permissible in certain situations. See generally *Struksnes Construction Co*., 165 NLRB 1062 (1967). One such situation may occur when the poll is conducted to verify the majority status of an incumbent union. The Board's established prerequisite for the lawful polling of employees in this situation is that the employer have a reasonable doubt of the unions's majority status based on objective considerations that would be sufficient for a lawful withdrawal of recognition. See, e.g., *Thomas Industries*, 255 NLRB 646 647 (1981), *Montgomery Ward & Co*., 210 NLRB 717 (1974). The employer's asserted basis must, of course, exist at the time or before it undertakes the poll. See, e.g., *Orion Corp*., 210 NLRB 633, 634 (1974), enfd. 515 F.2d 81 (7th Cir. 1975). See generally discussion at *Hojaca Corp*., 291 NLRB 104 (1988).

Thus, using these principles, the General Counsel's prima facie case that the Union is entitled to continued recognition by Respondent as the exclusive collective-bargaining representative of Respondent's employees in the unit described above is established by facts not in controversy in this case, i.e., the Union represented Respondent's employees for many years, and entered into numerous, successive collective-bargaining agreements with Respondent, until the Respondent's operation of its business was interrupted for some months by a fire which destroyed the facility in which the business operated; at the time of the fire there was an existing collective-bargaining agreement.

Nor is it disputed that Respondent, upon resumption of its restaurant operations following reconstruction of a facility, refused to recognize the Union as the collective-bargaining representative of its employees.

Instead, therefore, Respondent asserts, and now bears the burden of proof that its withdrawal of recognition was privileged by having been based upon a good faith doubt that the Union still enjoyed the support of a majority of employees, as demonstrated by consideration of objective criteria. *Hutchinson-Hayes International*, 264 NLRB 1300, 1304 (1982).

In its attempt to do so, Respondent has adduced evidence upon a number of factors which it believes support its position, including:

> 1. Respondent's facility was destroyed by fire in January, 1990.
> 2. Respondent's operation was interrupted until a new facility was built.
> 3. All employees were sent letters of termination in February, 1990.
> 4. Most former employees thereafter sought and obtained employment elsewhere.
> 5. In February, 1990 Respondent notified the Union of its withdrawal from a multi-employer bargaining group, and termination of the existing collective bargaining agreement at its expiration.
> 6. Upon reopening in October 1990 Respondent employed a number of employees who'd not worked for it previously.
> 7. During the hiatus, and after reopening, a number of employees made statements indicating disaffection with the Union.
> 8. Upon learning of these alleged unfair labor practices, almost all employees signed a petition for decertification of the Union.

While Respondent notes that it was not immediately known even whether or not Respondent would choose to rebuild from the fire and resume operations, it is undisputed operations did resume only about eight months later. When operations were resumed, Respondent operated with the same name, in the same location, and under the same ownership. The reopened operation had almost the same hours, opening half an hour earlier and closing an hour earlier. Its seating capacity was little changed, rising from 210 to 217. It continued to serve similar food. It utilized the same liquor license. And it again employed 18 employees, exclusive of relatives of the owner. Moreover, those employees worked in the same classifications as existed before the fire.

Therefore, I find that Respondent's business was essentially unchanged when it reopened from that which existed before the fire, and that no changes were made which might justify Respondent's refusal to bargain further with the Union. *Morton Development Corp*., 299 NLRB 649 (1990); *Schmutz Foundry Co.*, 251 NLRB 1494 (1980).

Respondent's termination of employment of the entire employee complement in February 1990 is not a determinative factor in deciding the question of whether or not Respondent continued to owe the Union the duty to bargain collectively. *NLRB v. Band-Age, Inc*., 534 F.2d 1 (1st Cir. 1976), enfg. 217 NLRB 449 (1975).

Similarly, Respondent's letter to the Union terminating its collective bargaining agreement effective upon its expiration,

and withdrawing from the multiemployer bargaining group, is clearly insufficient to effect an end to the entire collective-bargaining relationship. Such letters are often sent by parties to collective-bargaining relationships where one party merely wishes to change the manner of bargaining. Respondent's letter said nothing at all about withdrawing recognition from the Union, and there was nothing in it which would have placed the Union upon notice that any such result was intended. I see absolutely no reason to place a different, or additional, construction upon the letter than was expressed therein. Indeed, I find it of particular importance in deciding this case that Respondent *never*, prior to its withdrawal of recognition, expressed the existence of its good-faith doubt to the Union. If Respondent harbored doubt of the Union's continued majority status surely it is reasonable to require that it express it to the Union, particularly if that alleged doubt is to be utilized to privilege its withdrawal of recognition.

That its employees sought and obtained employment elsewhere in the hiatus between the fire and the restaurant's reopening is of no legal moment. It is merely a recognition of the reality that employees must work and earn income to pay their bills. In fact, a majority of former employees returned to Respondent's employ upon the reopening, i.e., 10 of 18 of the rebuilt restaurant's employees were identical to those employed before the fire. In any event, the law presumes that the Union's majority status among a complement of employees, once established, continues in the same proportion as previously existed. *Ocean Systems*, 227 NLRB 1593 (1977); *Laystrom Mfg. Co.*, 131 NLRB 1482 (1965).

Finally, it is abundantly clear that the statements of disaffection concerning the Union allegedly made by prospective or actual employees are irrelevant to this case. For, the Board will not consider an employer's proffer of evidence to support an alleged doubt of a union's continuing majority unless it is shown to have been in existence at or before the time when the employer expresses or decides to express its alleged doubt; to do otherwise would be to ignore the ''good faith'' element necessary in such cases. See *Station KKHI*, supra. And, if an employer utilizes a poll of employees to support its allegation that the union has lost its majority, it is still true that the employer's asserted basis must, of course, exist at the time or before it undertakes the poll. See, e.g., *Orion Corp.*, supra.

Here, Respondent cannot meet these tests. Its owner, Duane Hansen, testified that in sending the letter of February 23, 1990, to the Union, at a time which predated any alleged expression of disaffection by employees about the Union, he believed that unless employees wanted to join the Union, or have some affiliation with it, when the restaurant was rebuilt, he no longer was under any obligation to the Union. This accords with the unrebutted and credible testimony of the Union's agent, Kelley, to the effect that during the negotiations between the Union and the multiemployer bargaining group, in May of 1990, Respondent's attorney told him that Respondent was rebuilding and would operate as a nonunion business.

Thus, it is clear that none of the alleged expressions of employee disaffection were made until after the decision had already been reached by Respondent to withdraw recognition from the Union.

In fact, this was conveyed to prospective employees of the new restaurant by Hansen. His own testimony establishes that it was only after he told them of the fact that the new restaurant would operate nonunion that they told him of their lack of support for the Union.

Similarly, Hansen's son, Dallas, told prospective waitresses that, since the negotiations with other restaurants had been concluded and that Respondent had heard nothing from the Union, if they wanted the Union it was something they'd have to decide, and that Respondent was not planning on being union. Such expressions as may have followed from employees about their union sentiments are thought to be unreliable, as having been influenced by employees' perceptions of what their prospective employer desires. *Kessell Food Markets*, 287 NLRB 426 (1987).

Thus, since the evidence in this case fails to establish that Respondent had any knowledge of employee disaffection, much less that a majority of employees were opposed to the Union, prior to the Union's request of July 27, 1990, to bargain collectively with it, it follows that the Respondent's failure and refusal thereafter to honor the Union's request must be found to be unlawful. *Louisiana Pacific Corp.*, 283 NLRB 1079 (1987). Certainly, reliance upon the filing of a decertification petition as evidence of a ''good faith doubt'' is misplaced when it is clear that Respondent did not even see the petition until a few days preceding the trial herein; thus, it obviously could have played no part in undergirding its doubt expressed months earlier. Accordingly, I find and conclude that Respondent has violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing bargain collectively upon request with the Union following the Union's request of July 27, 1990.

4. All full-time and regular part-time employees employed at Respondent's Austin, Minnesota restaurant, including cooks, waitresses/waiters, kitchen helpers, dishwashers, busboys/busgirls, hostesses and janitors; excluding office clerical employees, guards and supervisors as defined in the

Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

5. At all times material herein, the Union has been and is the exclusive bargaining representative of all the employees within the above-described unit appropriate for the purposes of collective bargaining within the meaning of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Riviera Supper Club, Austin, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain collectively in good faith with the Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit described above and, if an agreement is reached, reduce it to writing and sign it.

(b) Post at its facility in Austin, Minnesota, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to recognize or, on request, bargain collectively in good faith with Local 6-578, Oil, Chemical and Atomic Workers International Union, AFL–CIO in the appropriate unit set forth below.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with Local 6-578, Oil, Chemical and Atomic Workers International Union, AFL–CIO as the exclusive bargaining representative for our employees in the unit description, below, with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed contract. The appropriate unit is:

> All full-time and regular part-time employees employed at our Austin, Minnesota restaurant, including cooks, waitresses/waiters, kitchen helpers, dishwashers, busboys/busgirls, hostesses and janitors; excluding office clerical employees, guards and supervisors as defined in the Act.

RIVIERA SUPPER CLUB